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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. MCNICHOLS, JR., *et al.*, *Petitioner,*

vs.

MALCOLM BALDRIGE,
SECRETARY OF COMMERCE, *et al.*, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF FOR AMICUS CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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BRIEF FOR AMICUS CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Interest of Amicus Curiae

The Mexican American Legal Defense and Educational Fund (MALDEF) is a non-profit corporation established to protect and extend the civil rights of Mexican Americans and other Hispanics in the

United States. A major goal of the organization since its inception has been to enforce the constitutional guarantee of equal representation for equal numbers of people. A basic mechanism for achieving this goal is to ensure that the Census Bureau has accurately assessed the number of Hispanics within the population.

MALDEF has challenged the accuracy of census counts in various parts of the country, alleging that racial minority and low-income populations, including Mexican Americans, were disproportionately undercounted in the 1980 census, thereby adversely affecting their political representation and access to certain grant programs.[1] In many instances, including the cases referenced in footnote 1, discovery of address lists and vacant housing unit lists is an essential tool enabling private persons and groups and local governments to challenge the Bureau's population figures. Because of the fundamental constitutional and statutory rights involved,

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[1] Spanish Coalition, et al., v. Baldrige, C.A. No. 80C2994 (N.D. Ill.); Young v. Klutznick, __F.2d__ (6th Cir. No. 80-1751, June 15, 1981) (brief amicus curiae filed Jan. 10, 1981); Carey v. Klutznick, __F.2d__ (2nd Cir. No. 81-6042, June 12, 1981) (brief amicus curiae filed Feb. 12, 1981)

MALDEF urges that the Court uphold the district court's disclosure orders in McNichols v. Baldrige, and in Baldrige v. v. Shapiro, No. 80-1436.

MALDEF has also worked through its Census Awareness Project to promote the enumeration of all Hispanics in the United States on Census Day, including undocumented aliens. The importance of upholding strict confidentiality requirements for information furnished by individual respondents critically affects the accuracy of the census count of Hispanics, particularly in those communities where undocumented aliens reside. The Census Bureau is under the statutory obligation to assure respondents that their identities will not be disclosed and that the information they furnish will not be used against them. 13 U.S.C. §8(c). Undocumented aliens will be even less likely to cooperate with the census unless the prohibitions of 13 U.S.C. §9 against disclosure of individual identifying data are strictly enforced.

The Bureau should be permitted to disclose address lists and vacant unit lists, but only when the parties seeking

disclosure are involved in formal efforts to challenge statistical population data published by the Bureau and only under strictly tailored protective orders which effectively prevent both disclosure of individual identifying material and unauthorized use or publication of any material. The use of adequate protective orders will uphold the confidentiality provisions of §9 as well as allow meaningful opportunity for the general population to assure an accurate census count. Disclosure of address lists and vacant unit lists under these conditions would serve the two interests of Hispanics identified in this Statement, and is fully consistent with the Census statutes.

ARGUMENT

1. *The Census Confidentiality Statutes Can and Should be Construed to Preserve the Important Concerns of Accuracy in Enumeration and Confidentiality of Respondent Information.*

The controversy presented by this case, which arose due to alleged inadequacy of the 1980 census enumeration in Denver, implicates two fundamental concerns. First, allocation of Congressional representation according to the de-

cennial census of "the whole number of persons", required by Art. 1, Section 2, Clause 3 of the Constitution as amended by the Fourteenth Amendment, and apportionment within the states under this Court's one man-one vote standard, Kirkpatrick v. Preisler, 394 U.S. 526 (1969), require the most accurate possible census enumeration. Accuracy in this context connotes completeness. Second, the need for voluntary private cooperation to enhance accuracy requires a guarantee of confidentiality for individual information supplied by census respondents. That confidentiality interest is reflected in census statutes, 13 U.S.C. §§ 8(b), (c), 9(a), (b).

These two concerns are in tension, if not in conflict, in the circumstances of this case. Petitioner McNichols seeks access, subject to certain precautions to prevent improper disclosures, to address lists of vacant housing units compiled by Respondents as part of the census. Denver needs this information in order to challenge an alleged undercount of thousands of persons, apparently resulting from the Bureau's erroneous determination that many living units were vacant when in fact they

were occupied. Petitioners' access to address lists would clearly serve the interest of accuracy and completeness. Respondents have refused Denver access on the basis of the census confidentiality provisions, 13 U.S.C. §9(a). Adherence to the rule of confidentiality of census information will generally serve not only the statutory command, but also the voluntary cooperation necessary for successful enumeration of the population. The Court is asked in this case to identity the predominant interest, consistent with the statutes, or to interpret the statute in a manner that would reconcile both concerns.

Mexican Americans and other Hispanics have a particular stake in how the Court's resolution will affect both concerns identified above. If the 1980 census enumeration remains incomplete, the consequences of the undercount will not be evenly spread among all groups. Members of racial and ethnic minority groups, persons of low income, inner-city residents, and migrants (who are disproportionately minorities) were undercounted to a far greater degree than the general population. Their political representation and share of

economic benefits are reduced accordingly. The two district courts that have reached the merits of undercount litigation on an evidentiary record have both so found, in strong terms. Carey v. Klutznick, __F. Supp.__(S.D.N.Y. No. 80 Civ. 4550, 1980), rev'd on other grounds, __F.2d__(2nd Cir. No. 81-6042, June 12, 1981); Young v. Klutznick, __F. Supp.__(E.D. Mich. No. 80-71330, 1980), rev'd on other grounds, __F.2d__(6th Cir. No. 80-1751, June 15, 1981). Both of the cited cases were brought by cities (New York and Detroit) and a state (New York) with large minority populations. Denver, involved here, is another area of concentrated black and Hispanic population. The substantiality of the undercount issue underlying Respondent's demand for discovery of address lists is further illustrated by the pendency of "half a hundred" suits challenging the accuracy of the 1980 census, see Carey v. Klutznick, supra, __F.2d__, Slip Op. at p. 3722 n. 23, cases listed id. at p. 3718 n. 10. In many of these suits, plaintiffs have specifically alleged that the census differentially undercounted Hispanics. The Bureau has refused to make adjustments for

minority underenumeration, although it acknowledges the existence of that phenomenon. Thus, if Hispanics are to be accurately counted and not disproportionately undercounted, the courts must provide effective means for dissatisfied local governments or citizen groups to challenge census figures.

Mexican Americans and other Hispanics likewise have special reason to seek assurances of confidentiality for personal census information. Like other predominantly lower-income and minority persons, many Hisapnics are suspicious of government agencies and shun official involvements. While it is in their interest as a group to participate fully and be counted, many individuals do not believe that their own best interest lies in this direction. This reluctance is greatly exacerbated in the case of undocumented aliens and other persons who may live or work in proximity to aliens, from whom they are often not easily distinguishable.[2] The fear that the Bureau

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[2]The census is required to count all residents without regard to their citizenship, including undocumented residents. Federation for American Immigration Reform v. Klutznick, 486 F. Supp. 564,

might disclose personal identifying information about undocumented aliens, triggering investigative or administrative actions by federal or other law enforcement officials, is a powerful disincentive to responsive cooperation with the census in some Hispanic communities.

Amicus believes these two apparently contrary interests can and, indeed, must be accommodated under the controlling census statutes. Those statutes neither require nor permit, a blanket prohibition on all disclosure of all census information, as Respondents urge, and as the Court of Appeals for the Tenth Circuit held in this case. See, Shapiro v. Baldrige, __F. Supp.__ (D.N.J. 1980), aff'd __F.2d__(3rd Cir. 1980), cert. granted No. 80-1436 (upholding disclosure of address lists). Neither do the statutes allow any disclosure of information that is personal in nature or might permit individual identifications, nor any disclosure of information for other than "sta-

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576-577 (D. D.C. 1980) (three-judge court) (dicta) appeal dismissed 447 U.S. 916 (1980), aff'd __F.2d __(D.C. Cir. 1980), cert denied 49 LW 3710 (1981).

tistical purposes". See, p. 11, infra. These limitations, together with the conditions imposed by the district courts in this case and in Shapiro v. Baldrige, supra, faithfully carry out the mandate of the census statutes' confidentiality provisions and adequately protect the public interest in confidentiality of individual census information.

2. *Disclosure of Lists and Addresses to Denver, Subject to the Conditions Imposed by the District Court, Does Not Violate the Census Confidentiality Statutes.*

Amicus will not expand in great detail on the parties' arguments. While second to none in our commitment to the confidentiality of identifying respondent information, see p. 8 , supra, we submit that the census confidentiality statutes do not prohibit disclosure of the address lists sought by Denver in the manner ordered by the district court. We believe the correct analysis and application of the statutes to be that of Judge Stewart in his concurring opinion in Carey v. Klutznick, supra, Slip Op. pp. 3728-3740. Judge Stewart correctly criticizes the statutory interpretation of the Second Circuit panel

majority in Carey, the same interpretation adopted by the Tenth Circuit and espoused by Petitioner, as overbroad.

As Judge Stewart notes in his opinion, the limitation on use of census data by 13 U.S.C. §9(a)(1) to "statistical purposes" does not prohibit access to address lists used to produce or verify statistical summaries, e.g., population counts, where those lists contain no information from or about identifiable, individual census respondents. The purpose of such disclosure can only by statistical. Slip Op. at 3734. Likewise, 13 U.S.C. §9(a)(2), prohibiting disclosure of information from which data supplied census respondents can be (individually) identified, is no bar to release of address lists from which no information from or about any individual or establishment with a privacy or confidentiality interest could be discerned. And while 13 U.S.C. §9(a)(3) prohibits unauthorized persons from inspecting "individual reports", address lists are not such reports. Slip Op. at p. 3731. This "limitation of confidentiality to information furnished to the Bureau by census respondents", Slip Op. at p. 3733, constitutes a "sub-

stantial, but finite, confidentiality", id. at 3734. It strikes the correct balance between the competing interests of ascertainment and use of accurate statistical data, and confidentiality for individual census reports and identifying information. The key factors are (1) the source of the information sought; as Judge Stewart wrote, "information 'gathered, categorized and assembled' for the Bureau, but not reported by census respondents, [does not] acquire statutory protection," Slip Op. at p. 3735, and (2) the inability of users of the information to discern identifying information about individual respondents, id. at pp. 3738-3739.

This balanced reading of the confidentiality provision is not merely expedient social policy, but is mandated by the entire statutory scheme and its Congressional history. 13 U.S.C. §8, authorizing disclosure of certain data subject to §9a, reflects the broad, but not unlimited sweep of the confidentiality principle, in its permission for release of "tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent"

(emphasis supplied), 13 U.S.C. §8(b); and in its injunction against use of census data "to the detriment of any respondent or other person to whom such information relates" (emphasis supplied), 13 U.S.C. §8(c).

The underscored language of Section 8 was recently added as part of the 1976 Amendment, Pub. L. 94-521, 90 Stat. 2460. It re-emphasizes concerns expressed in Congress in the course of enacting the 1962 amendment and earlier statements of Congressional intent to protect respondents' confidentiality. See opinion of Judge Stewart, supra, Slip Op. at pp. 3731-3733.

The Court of Appeals gave an extremely broad sweep to the Section 9 prohibitions. Without careful analysis, it concluded, based on Seymour v. Barabba, 559 F.2d 806 (D.C. Cir. 1977)[3], that the undeniably broad language of Section 9 is necessarily all-encompassing. That reading of Section

[3] Seymour states, but does not depend on, the extremely broad reading of Section 9 adopted below. On its facts, Seymour illustrates the need to acknowledge that Section 9 does insulate information from or about respondents; it was a direct attempt by an anti-trust lawyer to obtain names and addresses of potential class members. At the same

9(a) flies in the fact of this Court's observation in St. Regis Paper Co. v. United States, 368 U.S. 208, 217-218 (1961) that "the prohibitions against disclosure contained in §9...do not purport to generally clothe census information with secrecy." In acting to overrule the specific result in St. Regis by amending Section 9(a), Congress in 1962 legislated only narrowly in regard to the confidentiality of respondent-retained individual census reports: it did not create a general secrecy law and manifested its opposition to such a provision. See discussion in Judge Stewart's opinion, supra, Slip Op. at pp. 3731-3732.

The Court of Appeals refused to sanction the order to disclose lists of vacant housing units on the assumption that such information "was disclosed by census respondents", 644 F.2d at 846, although such lists clearly do not identify them. On the contrary, it would appear that vacancy information is produced by a lack of response to census questionnaires or by in-

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time, it does not, for that reason, support rejection of purely statistical data subject to safeguards against escape of any identifying material.

spection by Bureau personnel.[4] The thrust of the Tenth Circuit's decision to give sweeping scope to Section 9 appears to be an effort, in service of what the Court perceives as sound policy, "to keep [Government's] promises to its citizens in a time of citizen distrust of government," 644 F.2d at 845. In addition to providing inadequate basis for judicial expansion of statutorily-defined limits, the Tenth Circuit identified only one of the two strong policies at stake.

The district court's order was carefully circumscribed to require production only of addresses which were believed vacant, and to restrict access to and use of even that data to the greatest degree consistent with providing Denver the information it needs to challenge the Bureau's palpably inflated estimate of vacancy rates.[5] That order was appropriate.

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[4] See Brief of Petitioners, p. 18.

[5] See Brief of Petitioners, pp. 7-10. The district court's precautionary measures, which should be acknowledged as a necessary element of any disclosure orders, include the following:

(1) All names and other identifying referercces must be deleted;

(2) All those who have access to address lists must be sworn to the same oath of secrecy

Conclusion

In reversing the judgment of the Tenth Circuit, the Court should strongly reaffirm the cardinal importance of protecting the confidentiality of census information from or about individual respondents, while assuring limited access to other information gathered by the Bureau, insofar as necessary to assure the accuracy of the population count.

DATED: August 4, 1981.

Respectfully submitted,

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as are personnel of the Bureau, and subjected to contempt orders;

(3) The information obtained must be used only to ascertain correct population figures (we would add, in formal proceedings such as the Bureau's Local Review Process or in litigation).

(Joint Appendix, pp. 116-117)